

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT**

**DIVISION FOUR**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LEPE,

Defendant and Appellant.

A151672

(Alameda County  
Super. Ct. No. C173580)

Jose Lepe (appellant) was convicted of unlawful possession of a firearm (Pen. Code § 29805)<sup>1</sup> and shooting from a motor vehicle (§ 26100). The jury also found that appellant personally and intentionally discharged a firearm causing death. (§ 12022.53, subd. (d).) He was sentenced to an aggregate term of 30 years to life in prison.

On appeal, appellant contends the judgment must be reversed because the erroneous admission of prejudicial evidence deprived him of a fair trial. Appellant also argues that (1) his sentence constitutes cruel and unusual punishment, and (2) he is entitled to the benefit of an amendment to section 12022.53, subdivision (d) (section 12022.53(d)) that went into effect while this appeal was pending, which grants the trial court discretion to strike sentence enhancements for intentionally discharging a firearm causing death. We affirm the judgment of conviction, but remand for resentencing so the trial court may exercise its discretion to consider striking the sentence enhancement.

---

<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

## **I. STATEMENT OF FACTS**

On the evening of December 1, 2013, Michael Stenger was shot and killed while crossing the street in front of his apartment. When police questioned appellant about the incident, he admitted shooting Stenger, but he claimed that he acted in self-defense because Stenger had shot him in 2012 and appellant was afraid that this time Stenger was going to kill him.

In 2016, appellant was tried on three counts: (1) murder; (2) possession of a firearm by a person with a domestic violence conviction in the past 10 years; and (3) shooting a firearm from vehicle.

### **A. The Prosecution Case**

On February 22, 2012, shortly before midnight, police were dispatched to Davis Street in Oakland where they found appellant, who had been shot in the chest. Several weeks later, appellant told police that a guy known on the streets as “Lil Mikey” was the person who shot him. Appellant said that Mikey was a family friend of appellant’s ex-girlfriend Ariana, and she told appellant that Mikey did not like him for some reason. Appellant also said that Ariana could help the police find Mikey.

Police investigated the 2012 shooting, but they did not locate any witnesses and they did not arrest Michael (aka “Mikey”) Stenger for this crime. Investigators did talk to Ariana Manzanares, but she declined to cooperate. Manzanares and appellant had dated in the past and had a child together, but appellant had been convicted of committing domestic violence against her, and he was subject to a restraining order protecting her and her mother, Sandra Garcia, which did not expire until 2014.

In December 2013, Stenger was living with Manzanares and her mother, who were family friends. On the evening of December 1, Stenger went on an errand with Florentino Pelayo. At around 9:52 p.m., Pelayo drove Stenger home, stopping across the street from Stenger’s apartment. It was dark, but the streetlights were on. As Pelayo said goodbye to Stenger, he did not notice a green car that was stopped across the street. Stenger, who was not carrying a weapon, walked behind Pelayo’s car, heading for his apartment. Pelayo pulled away from the curb, heard two loud shots, and then noticed the

green car across the street as it pulled away with a shattered front driver's side window. Frightened, Pelayo backed up to park and accidentally ran over Stenger's body.

Meanwhile, Stenger's neighbor heard gunshots from her living room and called the police. Officer Robert Gallinatti arrived at 9:55 p.m., activated his body camera and went to aid Stenger. Paramedics arrived minutes later, but at 10:05 p.m., Stenger was pronounced dead. His cause of death was a single gunshot to the head.

The shooting was partially captured on surveillance video from cameras on a nearby building. Police traced the green car to appellant's cousin, Alfredo Bueno. Bueno had loaned his car to appellant and it was returned with a shattered driver's side window. When Bueno had asked appellant what happened, appellant said that his life was over, that he had seen Stenger and had to "get on him," and that Bueno had to get rid of the car. Bueno asked why appellant had put Bueno in this position and appellant responded that he had to defend himself.

When appellant was arrested for shooting Stenger, police found .40-caliber ammunition in his home. Appellant, who lived alone, denied the ammunition belonged to him. During a lengthy police interview, appellant told police a series of lies, including that he did not know anything about Stenger's shooting; that on the evening of December 1, he did not drive a car, see Ariana or leave his home; and that he did not carry or own a gun. Appellant also told police that Stenger had problems with a lot of other people and tried to implicate a person he referred to as "G." Eventually, appellant admitted that he shot Stenger, but he claimed that he acted in self-defense because Stenger was coming right at him and had his hand in his pocket reaching for a weapon. He also told police that he had heard on the street that Stenger did have a gun, but that someone took it from his body after the shooting.

At trial, the prosecution presented evidence that during the year before Stenger was shot, he was afraid appellant was going to kill him. In February 2013, Stenger and his friend Jose Mendoza were walking on Fruitvale Avenue when a car began to pull up in front of them. Stenger realized that appellant was the driver and ran away. That summer, Stenger told his friend and neighbor, Emilia Gutierrez, " 'Man, I feel that one

day [appellant's] going to get me.' ” Then, in November, Stenger showed his mother a picture of appellant, telling her “ ‘If anything happens this is who did it.’ ” During this time period, Stenger often discussed his fear of appellant with Alicia Alcala, whose children grew up with Stenger. Stenger told Alcala that he gave his mom a photograph of a man and if anything were to happen to him, the man in the photo was responsible.

## **B. The Defense Case**

Appellant testified that when Stenger approached him in December 2013, he feared for his life because Stenger had shot appellant in 2012 and it appeared that Stenger was going to shoot him again.

Appellant gave the following account of the February 2012 shooting: One night, a man in a black hoodie ambushed him in his driveway and began shooting at him. Appellant saw the man's face and recognized Stenger. Appellant knew Stenger because he was Manzanares's “play cousin,” and Manzanares had told appellant that Stenger did not like him. Stenger pointed his gun and fired multiple shots, hitting appellant once in the chest. Appellant took off running, thinking he was going to die, and heard at least 10 more shots being fired before he felt a bullet strike his back. He fell, but got up and continued to run, finally reaching the backdoor of a home where residents called the police.

Appellant testified that while he was in the hospital, he decided to risk being called a snitch by telling the police that Stenger was his shooter, so that they could handle the matter. He acknowledged telling the police that he felt he needed to do something, but he explained to the jury that he was not talking about retaliating, but about needing to protect himself. After appellant was released from the hospital, he left Oakland for several months while he recovered from his injuries.

Appellant testified that after he returned to Oakland, he saw Stenger only one time prior to December 1, 2013. He was going to a CVS pharmacy when he saw Stenger and another man walking through the parking lot. Stenger ran away and appellant just turned and went in the opposite direction. Appellant testified that throughout this period, his “mindset” about Stenger was one of fear because Stenger had never been arrested. He

felt unsafe because Stenger was “still out there trying to kill me.” Also, Manzanares told him that Stenger had made a threat against her and their daughter.

Appellant also presented the jury with his account of the December 2013 shooting. Manzanares texted him around 9:00 p.m., asking him to bring diapers for their daughter. Appellant did not want to go because he did not want to run into Stenger. Nevertheless, he drove there in Bueno’s car, taking his gun because he felt he needed protection when he was out at night. He pulled up outside the apartment and Manzanares got in the car with the baby. While he played with his daughter in the front seat, appellant’s gun was tucked in his waistband, his foot was on the brake pedal and the car was in the drive position. Appellant had intended to park once another car moved, but he never did. Meanwhile, a passenger got out of the vehicle across the street. When the person was approximately 15 feet away, Manzanares said, “ ‘Is that Mikey?’ ” Appellant passed the baby back to Manzanares. He was afraid because he was “looking at the guy that already tried to kill [him].”

Appellant testified that Stenger had one hand on the trunk of the car that he had exited, and when the other hand moved to his pocket appellant thought Stenger was reaching for a gun. Appellant started to pull away in the car but was blocked in by traffic. By the time the cars passed Stenger was “already on top of” him. He took out his gun and cocked it because he thought Stenger was going to kill him and by the time he looked back up Stenger was “right there.” As Stenger continued to approach, appellant fired his gun through the car window because he was scared that Stenger was coming to kill him, trying to “finish[] him off.”

### **C. The Jury Verdicts**

The jury deliberated for more than three days before returning their verdicts. Two verdicts were returned shortly before noon. Appellant was found guilty of the count two charge of unlawful possession of a firearm by a person who had been convicted of domestic violence within ten years of the offense (§ 29805), and the count three charge of willfully discharging a firearm from a motor vehicle at a person who was not an occupant of the motor vehicle (§ 26100). In its verdict on the count three charge, the jury also

found that in the commission of the offense, appellant “personally and intentionally discharged a firearm and caused death to Michael Stenger” within the meaning of section 12022.53(d).

After these verdicts were recorded, the court observed that it appeared the jury had reached “some decisions” as to the count one charge that appellant committed murder. (§ 187, subd. (a).) Then the court ordered the jury to return to the jury room and complete the verdict form for that charge to the best of their ability. A few hours later, the jury returned a verdict finding appellant not guilty of first-degree murder. (§ 187, subd. (a).) Then they confirmed for the record that they were “hopelessly deadlocked” about the count one charges of second-degree murder and manslaughter, and accordingly, the court declared a mistrial as to those charges.

## **II. DISCUSSION**

### **A. Appellant’s Claims Regarding the Admission of Evidence**

“We review a trial court’s rulings on the admission and exclusion of evidence under the abuse of discretion standard.” (*People v. Thompson* (2010) 49 Cal.4th 79, 128.) Under this standard, an evidentiary ruling “will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

#### **1. Stenger’s Statements that Appellant Was Going to Kill Him**

Appellant first contends the trial court committed reversible error by admitting hearsay statements Stenger made prior to his death expressing fear that appellant was going to kill him. The trial court admitted the statements pursuant to the state of mind exception to the hearsay rule, codified in Evidence Code section 1250. The parties disagree about whether Stenger’s state of mind was relevant under these facts. The pertinent law is summarized in *People v. Kovacich* (2011) 201 Cal.App.4th 863 (*Kovacich*), a case cited by both parties.

Evidence Code “[s]ection 1250 provides an exception [to the hearsay rule] for ‘evidence of a statement of the declarant’s then existing state of mind, emotion, or

physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health).’ In order for this exception to apply, the statement must not have been made under circumstances indicating a ‘lack of trustworthiness’ (§ 1252), and must be offered either ‘to prove the declarant’s state of mind, emotion, or physical sensation,’ or ‘to prove or explain acts or conduct of the declarant.’ (§ 1250, subd. (a).) A prerequisite to this exception is that the declarant’s mental state or conduct be placed in issue. [Citation.] ‘Evidence of the murder victim’s fear of the defendant is admissible when the victim’s state of mind is relevant to an element of the offense. [Citation.] Such evidence is also admissible when the defendant claims that the victim has behaved in a manner inconsistent with that fear. [Citations.]

“ ‘In contrast, a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind. [Citation.] Again, such evidence must be relevant to be admissible—the declarant's state of mind must be in issue. [Citation.] A limiting instruction is required with declarations used as circumstantial evidence of the declarant’s mental state; that is, the declaration is not received for the truth of the matter stated and can only be used for the limited purpose for which it is offered.’ ” (*Kovacich, supra*, 201 Cal.App.4th at pp. 884–885.)

Applying these rules here, we conclude the trial court did not abuse its discretion. The defense theory was that appellant shot Stenger in self-defense because he thought Stenger was reaching into his pocket to retrieve a weapon and closing in on the car where appellant was visiting with his family. By suggesting that Stenger behaved in this manner, the defense put at issue Stenger’s state of mind at the time of the shooting. The trial court could have concluded reasonably that statements by Stenger evidencing his fear of appellant tended to undermine the self-defense theory. Moreover, the jury was instructed regarding the limited purpose of this state of mind evidence.

Appellant contends that evidence probative of Stenger’s state of mind was inadmissible because his conduct at the time of the shooting was not disputed by the

defense. The argument goes that surveillance video from the crime scene “captured everything that happened,” including that Stenger had no weapon, was not behaving aggressively, and probably did not even see appellant prior to the shooting. Appellant posits that because Stenger’s conduct was so clear, the only disputed issue for the jury to decide was whether appellant’s reaction to Stenger was reasonable.

Appellant ignores or misconstrues relevant parts of the trial record, which show that the acts or conduct of Stenger immediately prior to the shooting were in dispute. During the hearing on in-limine motions, defense counsel expressly confirmed that the defense theory at trial was going to be self-defense or imperfect self-defense. Case law makes clear that a self-defense claim to a murder charge can open the door for the prosecution to introduce evidence demonstrating that the victim’s state of mind was not consistent with conduct attributed to him or her by the defendant. (*People v. Spencer* (1969) 71 Cal.2d 933, 945 [self-defense claim to manslaughter charge opened door for prosecution to introduce evidence that defendant was the aggressor, including a statement the victim made to a friend expressing her fear that the defendant would become violent and kill her once she broke up with the defendant]; *People v. Escobar* (2000) 82 Cal.App.4th 1085 [trial court did not abuse its “broad discretion” by allowing rebuttal witness to testify that a few weeks before the shooting, the victim told her that she wanted to divorce defendant, but she was afraid of him because he had told her that if she left him he was going to kill her].)

Here, appellant’s self-defense claim was anchored by his own testimony that he thought Stenger was reaching into his pocket for a weapon. This claim was shored up by defense counsel’s argument to the jury that the surveillance video was consistent with appellant’s perception about what Stenger was intending to do. Evidence that Stenger was afraid of appellant was relevant because it tended to show that appellant’s testimony about his perception of Stenger’s behavior just prior to the shooting was false and perhaps even fabricated.

Appellant relies on *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*). In that case, the defendant shot and killed his wife while she was reclining on a couch during a post-



dinner argument they had in front of their young daughter, who testified at her father's murder trial. The defendant did not dispute his daughter's account but claimed not to remember the shooting. Rejecting an insanity defense, the jury convicted defendant of second-degree murder. However, the judgment was reversed because the trial court committed prejudicial error by permitting a neighbor to testify about a telephone conversation she had with the victim on the morning of the shooting when the victim said, " 'I know he's going to kill me. I wish he would hurry up and get it over with. He'll never let me leave.' " (*Id.* at p. 528.) The *Ireland* court explained that the victim's statement was relevant to prove the truth of the matters she asserted, but for that purpose it was inadmissible hearsay. (*Id.* at p. 529.) The statement was not admissible under either prong of the section 1252 state of mind exception to the hearsay rule. First, the victim's "state of mind on the day of her death was not *itself* an issue in the case." (*Ibid.*) Second, the victim's out of court statement was not relevant to prove or explain her acts or conduct because her acts or conduct "at the time of the homicide were simply not in dispute; the defense did not deny that such 'acts or conduct' were precisely as described by the Ireland's daughter[.]" (*Id.* at p. 532.)

Appellant contends this case is "not meaningfully distinguishable" from *Ireland*. We disagree. In that case, there was no dispute that the victim was reclining on a couch when the defendant shot her. Here, there was a dispute about Stenger's demeanor and the nature of his conduct at the time he was shot. The defense claimed that Stenger's conduct was consistent with a finding that appellant acted in self-defense, and the prosecution claimed that Stenger was simply crossing the street minding his own business when appellant shot him. Stenger's prior declarations constituted evidence that his state of mind toward appellant was one of fear and avoidance, which tended to undermine the defense theory that appellant acted in self-defense.

## **2. Video of Stenger after the Shooting**

Appellant next contends the trial court erred by admitting evidence of film from Officer Gallinatti's body camera, which showed Stenger lying in the street after he was

shot. Appellant contends this evidence was inadmissible because it was irrelevant, cumulative of crime scene photos, and highly inflammatory.

First, the video was relevant. It was offered by the prosecution to rebut the defense theory that somebody removed a weapon from Stenger's body after he was shot. Appellant made this claim during his police interview and repeated it at trial. The video from the officer's body camera showed that Stenger was not armed with a weapon. The video also captured a clear image of Stenger's upper body including his tight-fitting tee shirt. The trial court found this evidence was relevant to assess the defense theory that Stenger made movements that were consistent with somebody reaching for a weapon.

We disagree with appellant that this case is like *People v. Turner* (1984) 37 Cal.3d 302, 321 (overruled on another ground in *People v. Anderson* (1987) 43 Cal.3d 1104, 1115). In that case, photographs of the murder victims were introduced for the stated purpose of showing the positions of their bodies and the nature of their wounds, but those matters were irrelevant. Here by contrast, the body camera footage was relevant to rebut defense theories in this case.

Second, we reject appellant's contention that the video was cumulative of crime scene photos taken by law enforcement before Stenger's body was removed. Officer Gallinatti was the first official to arrive at the shooting and the court admitted only the first 90 seconds of a 30-minute video from the body camera. This footage contained the earliest depiction of Stenger after he was shot, before his shirt was removed and first responders made efforts to save his life. The crime scene photos were taken later after efforts to save Stenger's life had failed. Thus, as the trial court found, the video was not cumulative of the photos because together they "tend[ed] to show a continuum of the events that occurred."

Finally, photographic images of a murder victim are not per se inflammatory and prejudicial. (*Turner, supra*, 37 Cal.3d at p. 321 [admission of irrelevant photographs was not prejudicial because they were not gruesome, and the evidence of guilt was overwhelming].) Having said that, we have reviewed the video and agree with the trial court that the imagery is graphic. Despite this fact, the court found that the evidence was

sufficiently probative to justify its admission. We cannot say that this ruling was an abuse of discretion.

## **B. Sentencing Issues**

As noted, appellant contends that his sentence constitutes cruel and unusual punishment and that a remand is required in any event so that the trial court can exercise its discretion in deciding whether to impose a 25-year-to-life sentence enhancement pursuant to section 12022.53(d).

### **1. Background**

Appellant was sentenced on May 12, 2017.<sup>2</sup> The probation department and the district attorney recommended imposing the maximum possible sentence of 32 years and 8 months to life in prison, calculated as follows: an upper term determinate sentence of 7 years for violating section 26100 by shooting a firearm from a vehicle; a consecutive indeterminate term of 25 years to life for the section 12022.53(d) enhancement; and a consecutive 8 months representing one-third the midterm for the unlawful gun possession in violation of section 29805.

Appellant filed a sentencing memorandum requesting that the court impose a “non-life sentence that is commensurate with the sentencing options of § 26100 and a felon in possession of a firearm.” Defense counsel argued that imposing the 25-year-to-life-enhancement would constitute cruel and unusual punishment because of the unique factual circumstances of this case.

At the sentencing hearing, the court considered the probation report, sentencing memoranda, a letter from Stenger’s fiancé, who was also the mother of his two-year-old child, and several letters from family and friends of appellant. The court also heard arguments from counsel, which focused almost exclusively on the question whether it

---

<sup>2</sup> Sentencing was postponed several times and for several reasons, including to discuss the possibility of settlement with respect to the outstanding charges. Each time appellant waived time for sentencing, he also waived time to be retried for second-degree murder and manslaughter. After appellant’s sentence was announced, the prosecutor dismissed the pending charges in the interest of justice.

would be cruel and unusual punishment to impose the 25-year-to-life sentence enhancement.

Defense counsel argued that because imposition of the enhancement was otherwise mandated by statute, it should be stricken on the ground that a sentence of this magnitude would constitute cruel and unusual punishment under the federal and state constitutions. To support this view, defense counsel highlighted evidence that there was no premeditation or deliberation and that appellant himself was a victim of a violent crime and was genuinely afraid of Stenger. Counsel also posited that appellant had no significant criminal history and that imposing this enhancement would mean that his sentence would be longer than the sentence for first degree murder even though he was found not guilty of that charge. Under these circumstances, counsel argued, imposing the 25-year-to-life enhancement would be fundamentally unfair and a violation of the constitutional prohibition against cruel and unusual punishment.

The prosecutor disagreed with every position advanced by the defense. He argued that the legislature made a reasoned decision to enhance punishment for causing death by shooting at someone from a vehicle regardless whether that conduct amounted to murder. He disputed the defense version of the events and portrayal of appellant as a victim and argued that there was nothing unique or unusual about this case to support a finding that imposing the sentence enhancement would constitute cruel and unusual punishment. Ultimately, the prosecutor urged the court to impose an aggravated sentence of 32 years and 8 months to life.

Before announcing the sentence, the court found that imposing section 12022.53(d) in this case would not constitute cruel and unusual punishment because the resulting sentence would not be so disproportionate to the offense for which it was being imposed as to shock the conscience or offend fundamental notions of human dignity. (See *People v. Dillon* (1983) 34 Cal.3d 441, 478.) In explaining this ruling, the court addressed separately, three pertinent factors: (1) the nature of the offense and/or the offender; (2) whether the punishment was disproportionate when compared to punishment for greater offenses; and (3) how the punishment compared with punishment

proscribed by other jurisdictions for the same offense. (See *People v. Em* (2009) 171 Cal.App.4th 964, 972.) It spent significant time reviewing the evidence and supporting its conclusion that imposing this enhancement under these facts did not constitute cruel and unusual punishment.

Then the court announced its tentative ruling regarding appellant's sentence, as follows: for count three, a mid-term sentence of 5 years for the substantive violation of section 26100, and a consecutive indeterminate term of 25-years-to-life-for the section 12022.53(d) enhancement; for count two, a concurrent 8 month term for violating section 29805, representing one-third the midterm, which was to be stayed pursuant to section 654.

After the court announced its tentative ruling, it invited counsel to comment, but neither did. Accordingly, the court incorporated the tentative sentence into its final ruling, providing additional explanation and making supplemental findings as necessary. Regarding the section 12022.53(d) enhancement, specifically, the court made this additional comment: "The indeterminate term. The enhancement charged in conjunction with count three, personal intentional discharge of a firearm causing death was found [true] by the jury. The enhancement carries a mandatory and consecutive 25 years to life, [] which the court is imposing and deems appropriate based on the evidence presented in this case."

## **2. Remand Is Required**

When appellant was sentenced, the trial court had no discretion to strike the 25-year-to-life enhancement mandated by the jury's finding that appellant violated section 12022.53(d). (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424.) However, while this appeal was pending, a statutory amendment added section 12022.53, subdivision (h) (section 12022.53(h)), which now provides that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section."

The People concede that section 12022.53(h) applies retroactively to appellant. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1091.) But they contend appellant is not

entitled to a remand because the trial court would not have stricken this sentence enhancement under any circumstance.

“ ‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ ” (*People v. Gutierrez* (2014) 58 Cal.4th, 1354, 1391.) Thus, “the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ ” (*Ibid.*; accord *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.) “Without such a clear indication of a trial court’s intent, remand is required when the trial court is unaware of its sentencing choices.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.)

In this case, the court and parties were all keenly aware that the court did not have discretion to strike the section 12022.53(d) enhancement, which is why so much time was spent addressing appellant’s claim that his sentence constituted cruel and usual punishment. However, the court did not expressly or implicitly address what it would have done if it did have discretion to strike the enhancement.

The People find two indications in the record allegedly supportive of their contention that the trial court would not have stricken the enhancement. First, the court highlighted evidence of appellant’s culpability and the extremely dangerous decisions he made without any immediate provocation. However, these observations by the trial court were part of the explanation why appellant’s sentence was not cruel or unusual punishment. While these same facts could be determinative for a court exercising its discretionary powers, we are not able to speculate about that.

Second, the People point out that when the court announced appellant’s sentence, it stated that the jury’s true finding regarding the gun use allegation carried “a mandatory and consecutive 25 years to life,” and that the enhancement was “deem[ed] appropriate based on the evidence presented in this case.” The People interpret this remark as a clear

indication that the trial court would not have stricken the enhancement if it had the discretion to do so. We disagree. The court found that appellant's sentence was appropriate because the jury's finding was supported by the evidence. But there was no question before the court about whether it was appropriate to strike the enhancement because at the time it did not have discretion to do that.

In deciding other aspects of appellant's sentence in which it did have discretion, the court did not follow recommendations to impose a maximum sentence. As the record does not clearly indicate that the trial court would have imposed the same sentence if it had discretion to strike the section 12022.53 enhancement, a remand for resentencing is required to afford appellant the benefit of the statutory amendment.

Finally, we recognize that the trial court would not have discretion to impose the 25-year-to-life sentence enhancement if doing so would constitute cruel or unusual punishment. However, pertinent authority establishes that "a sentence enhancement of 25 years to life is not disproportionate to a violation of Penal Code section 12022.53; the Legislature has determined that a significant increase in punishment is necessary and appropriate to protect citizens and deter violent crime. [Citations.]" (*People v. Em*, *supra*, 171 Cal.App.4th 964, 973.) Moreover, the trial record supports the lower court's rejection of appellant's claim that imposing this sentence on him in particular would shock the conscience because extenuating circumstances mitigate his culpability for killing Stenger. (See *People v. Martinez* (1999) 76 Cal.App.4th 489, 496 ["Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment."].) Thus, we affirm the trial court's ruling that appellant's sentence was not unconstitutional under these circumstances.

### **III. DISPOSITION**

The judgment is affirmed except to the extent that this case is remanded for resentencing in accordance with this opinion.

---

TUCHER, J.

WE CONCUR:

---

POLLAK, P. J.

---

STREETER, J.